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No. 90-1972

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Petitioner,

v.

JOHN H. WILLIAMS, JR.

Petition for Writ Of Certiorari To The United States Court of Appeals For The Tenth Judicial Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an indictment may be dismissed without prejudice, pursuant to the district court's supervisory powers, when the government withholds from the grand jury substantial exculpatory evidence negating an essential element of the offense charged.

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OPINIONS BELOW

The opinion of the Tenth Circuit Court of Appeals is reprinted in the Appendix to the Petition for a Writ of Certiorari ("Petition"), at pages 1a-15a. The unreported Order of the District Court is also included in the Appendix to the Petition at pages 19a-26a.

JURISDICTION

The jurisdiction of the Court has been invoked by petitioner under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Respondent contends that no constitutional provision is involved in this litigation, nor has any constitutional issue been raised at any point in these proceedings by the government.

STATEMENT OF THE CASE

Accurate statements of the factual and procedural history and circumstances of this case are found in the orders of the District Court and the Court of Appeals, copies of which are appended to the Petition. Respondent will not further elaborate on the facts here. Respondent notes, however, that the government's recitation of the facts is far from complete and, in one critical respect, misrepresents the record. Specifically, the government attributes to the District Court the observation that " * * * respondent used an unconventional method to account for his current assets." Petition pp. 5-6. This is not true. The District Court did not characterize respondent's method of accounting as "unconventional." Rather, the court specifically concluded that a notation included in the respondent's financial statements put the banks on notice that those financial statements were not prepared in accordance with generally accepted accounting principles. Petition App. 10a.

SUMMARY OF THE ARGUMENT

The question presented in the Petition was neither presented to nor addressed by the courts below. Moreover, even if the issue had been presented, there is no conflict among the circuits involving cases where, as here, the prosecutor withheld from the grand jury *substantial* exculpatory evidence negating guilt.

ARGUMENT

A. The "Question Presented" in the Petition Was Never Raised Below.

The government claims that the question presented by its Petition is "[w]hether an indictment may be dismissed because the government failed to present exculpatory evidence to the grand jury." Petition p. (I). This was not the issue upon which the decisions of the trial and appellate courts turned in this case. More importantly, with respect to the question of whether the case is one which calls for the exercise of this Court's extraordinary and discretionary jurisdiction, the issue was never raised or urged by the government in any stage of these proceedings prior to the filing of the Petition.[1]

Indeed, in the District Court and on appeal the government unequivocally embraced the very principles which it now asks this Court to review. The government consistently asserted that it had fully complied with its

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[1] Aside from the fact that the question presented by the government in its Petition was neither pressed nor passed upon below, the argument found in the Petition has no relationship to the issue which the government claims is presented. The Petition repeatedly describes the Tenth Circuit's holding to be that the grand jury must receive any information that is relevant to any reasonable theory it may adopt. *E.g.*, Petition pp. 5, 7, 10, 12, 13 and 16. Although language to this effect is found in the Court of Appeals' opinion (Petition App. 8a), it was not the court's "holding." Instead, the Court of Appeals affirmed the District Court's finding that the government had in its possession substantial exculpatory information "on perhaps the most crucial element of the crime charged. . . . " Petition App. 26a. The court also upheld the District Court's finding that withholding this evidence from the grand jury rendered its "decision to indict gravely suspect." *Id.*

obligations under controlling authorities of the Tenth Circuit and this Court by supplying exculpatory evidence to the grand jury. For example, in a brief filed on appeal the government stated:

> The government has acknowledged that it has certain responsibilities under the case of *United States v. Page*, 808 F.2d 723 (10th Cir. 1987), and that [sic] includes a duty to not withhold substantial exculpatory evidence from a grand jury if such exists. * * * The government would contend that although it may not have been familiar with the *Page* case by name, it was familiar with and complied with the principles stated in the case.

Gov't C.A. Resp. Br. at 9-10.

The government's position throughout this litigation has been that it complied with its duty to disclose substantial evidence which directly negates the guilt of a subject of the investigation. *See United States v. Page*, 808 F.2d 723, 727-28 (10th Cir.), *cert. denied*, 482 U.S. 918 (1987). The government never took issue with its obligation or with the holding in *Page*, but instead challenged whether the evidence at issue was either substantial or exculpatory.

> The government contends that *Page, supra*, requires the government to present to the grand jury evidence which is clearly substantially exculpatory. The government has shown that the evidence which the defendant argues is exculpatory is neither substantial nor clearly exculpatory; thus, the government did not err in failing to present it to the grand jury, and the trial court did err in dismissing the indictment.

Id. at 11. Similarly, in its Brief in Chief to the Tenth Circuit the government was quick to recognize that the Court *should follow* its prior decision, stating "[t]he government

would assert that this Court should follow the holding of *Page*. . . . " Gov't C.A. Brief in Chief at 43. The Court of Appeals (as well as the District Court), however, recognized that the government's factual arguments were not supported by the record.[2] The government did not seek rehearing en banc so that the Tenth Circuit as a whole could consider a challenge to the fundamental proposition that a prosecutor in possession of substantial exculpatory evidence negating guilt must disclose that evidence to the grand jury.

Issues not raised in the Court of Appeals, but included in a petition for a writ of certiorari, will not normally be considered by this Court. *E.g., DeShaney v. Winnebago County DSS*, 489 U.S. 189, 195 n. 2 (1989); *Equal Employment Opportunity Commission v. Federal Labor Relations Authority*, 476 U.S. 19, 24 (1986). Similarly, issues not assigned as error in the Court of Appeals will not be addressed by this Court on certiorari. *Sonzinsky v. United States*, 300 U.S. 506, 514 (1937). "It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed." *Duignan v. United States*, 274 U.S. 195, 200 (1927). "Exceptional circumstances" have been limited to those situations in which jurisdictional issues have been overlooked in the

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[2] The District Court's conclusion that the government withheld substantial exculpatory evidence was a finding of fact. Petition App. 4a. This Court accords great weight to a finding of fact which has been made by a District Court and affirmed by a Court of Appeals. *E.g., NCAA v. Board of Regents of Univ. of Ok.*, 468 U.S. 85, 98 n. 15 (1984); *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). Moreover, the government does not ask this Court to set aside any factual findings of the District Court; instead it argues that the lower courts erred as a matter of law.

lower courts, *e.g., United States v. Storer Broadcasting Co.*, 351 U.S. 192, 197 (1956), when plain error has occurred and not been assigned as error, *e.g., Carpenters v. United States*, 330 U.S. 395, 412 (1947), when the Court considers a statutory issue not raised below in order to avoid reaching a constitutional issue, *e.g., Youakim v. Miller*, 425 U.S. 231, 234-35 (1976), or when the Court concludes that one of its previous opinions is no longer valid. *E.g., Blonder-Tongue Laboratories Inc. v. University of Illinois Foundation*, 402 U.S. 313, 320 (1971). None of these situations is presented in the instant case.

The rule which requires a party seeking review in this Court to raise the issues below is well established. Early cases following the rule articulated reasons for its existence. In *Montana Ry. Co. v. Warren*, 137 U.S. 348 (1890), the Court stated:

> It is fundamental that when the judgment of a court is challenged in error its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived and they are waived when the attention of the reviewing court is not called to them.

Id. at 351. In *Old Jordan Mining & Milling Co. v. Societe Anonyme des Mines*, 164 U.S. 261 (1896), the Court observed that "[i]f the action of the court below were correct as to the errors insisted upon as ground for reversal, none others will be considered here." *Id.* at 265.

The rule that questions not raised below will not be considered by this Court is applicable in criminal cases. In *United States v. Santana*, 427 U.S. 38 (1976), this Court did not reach the issue of whether the respondent had

standing to protest allegedly illegal seizures because the government did not raise the issue below. *Id.* at 41 n. 2. It does not appear that this Court has ever held that "exceptional circumstances" existed, thereby allowing review of a question not raised below, when the government has sought certiorari in a criminal case.[3]

In *United States v. Lovasco*, 431 U.S. 783 (1977), in the context of a dismissal of an indictment on speedy trial grounds, the government argued before this Court that the district court should have deferred action on the motion to dismiss until after trial, at which time it could have assessed any prejudice to the respondent in light of the events at trial. The *Lovasco* Court stated:

> This argument, however, was not raised in the District Court or in the Court of Appeals. Absent exceptional circumstances, we will not review it here. . . .
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> * * *
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> But even assuming that the basis for the District Court's dismissal could have "skewed" appellate proceedings regarding the procedural question, the fact is that the opening paragraph of the argument in the Government's brief below

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[3] *But cf. United States v. Mendenhall*, 446 U.S. 544 (1980), in which Justice Stewart, joined by Chief Justice Rehnquist, concluded that an issue not raised in the lower courts could be considered by this Court. Justice Stewart reasoned that "exceptional circumstances" existed where the decisions of the lower courts rested "on a serious misapprehension of federal constitutional law" and "determination of the question [was] essential to the correct disposition of the other issues in the case. . . . " *Id.* at 551 n. 5. The balance of the Court expressly declined to adopt such a construction of "exceptional circumstances." *Id.* at 560 and 570 n. 2.

> recognized that the only issue before the court was a due process question, and the remainder of the brief treated that question on the merits. And even after the Court of Appeals issued its decision based solely on the Due Process Clause, the Government's petition for rehearing did not squarely raise the procedural issue as an alternative ground for rehearing the case en banc.

Id. at 788 n. 7 (citations omitted).

United States v. Ortiz, 422 U.S. 891 (1975), is similar to the case at bar. There, the government took a position in its petition for certiorari which was in conflict with its lower court position. The government had argued to the Ninth Circuit that the principles announced in *United States v. Bowen*, 500 F.2d 960 (9th Cir. 1974), *aff'd*, 422 U.S. 916 (1975), controlled the decision in *Ortiz*. On certiorari, however, the government abandoned the very principles which it had urged the Ninth Circuit to adopt. This Court refused to consider the government's argument and stated:

> Examination of the Government's brief in the Ninth Circuit indicates that it did not raise this question below. On the contrary, it represented to the court that the decision in *Bowen* would be "determinative of the issues in this case." We therefore decline to consider this issue, which was raised for the first time in the petition for certiorari.

Ortiz, 422 U.S. at 898.

Just as the government in *Ortiz* represented to the Ninth Circuit that *Bowen* would be determinative of the issues in that case, the government in the instant case acknowledged that it had a duty under *Page* to present to the grand jury substantial exculpatory evidence negating guilt. In the Tenth Circuit, the government never raised

any challenge to the principles announced in *Page*. It embraced those principles.

The government had ample opportunities to raise the issue it now asserts. Yet it did not do so. No exceptional circumstances exist which might justify this Court's review of the issue presented for the first time in the Petition. The issue which has been framed by the government does not relate to jurisdiction nor did the failure to present the issue to the lower courts result in plain error.[4] The government's Petition should be denied.

B. The Holding in This Case Does Not Conflict With Decisions in Other Circuits.

The government argues that there is a conflict in the circuits regarding a prosecutor's duty to present exculpatory evidence to a grand jury. A review of the pertinent decisions of this Court and the decisions of the Courts of

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[4] The fundamental principle which requires that courts avoid reaching a constitutional question in advance of the necessity of deciding it also precludes review by this Court. *E.g., Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 445 (1988). Before deciding a constitutional question, the courts must determine whether other non-constitutional grounds might be dispositive. *Jean v. Nelson*, 472 U.S. 846, 854 (1985); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). There is no need for this Court to embark upon a gratuitous analysis of, and in essence render an advisory opinion as to, a constitutional issue that was not raised in the lower courts and has not been properly preserved for review. This is especially true when that failure provides a specific non-constitutional basis upon which to deny the Petition.

Appeals upon which the government relies reveals that there is, in fact, no conflict between the decisions in this case and those cited by the government from other circuits. If the prosecutor's conduct is such that it taints the grand jury process, the district court has the authority to dismiss an indictment, whether it is exercised as part of its constitutional or supervisory powers. No circuit court decisions have been cited by the government, nor do any exist, which conflict with this principle. The government's purported basis for certiorari review does not exist.

In affirming the dismissal of the indictment, the Tenth Circuit specifically approved the finding of the District Court that the failure to present exculpatory evidence "relevant to the critical issue of intent rendered the indictment suspect." Petition App. 14a. The Tenth Circuit relied upon *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), in which this Court stated:

> The prejudicial inquiry must focus on whether any violations had an effect on the grand jury's decision to indict. If violations did substantially influence this decision, or if there is grave doubt that the decision to indict was free from such substantial influence, the violations cannot be deemed harmless.

Id. at 263.

The government's authorities are, without exception, factually and legally distinguishable from this case. In *United States v. Rivera-Santiago*, 872 F.2d 1073 (1st Cir.), *cert. denied*, 492 U.S. 910 (1989), and *United States v. Vincent*, 901 F.2d 97 (8th Cir. 1990), the First and the Eighth Circuits specifically stated that federal prosecutors are not *normally* under a duty to disclose exculpatory evidence. *Santiago*, 872 F.2d at 1087; *Vincent*, 901 F.2d at 99. The *Santiago* court cites *United States v. Wilson*, 798 F.2d

509, 517 n. 2 (1st Cir. 1986), for the *exception* to the nondisclosure rule when the prosecutor is aware of substantial evidence negating guilt. *Vincent* cites *United States v. Bucci*, 839 F.2d 825, 831 n. 8 (1st Cir. 1988), *cert. denied*, 488 U.S. 844 (1989), which likewise obligates a prosecutor to disclose substantial exculpatory evidence negating guilt. Moreover, the *Bucci* decision favorably cites *Page* for this proposition. In these cases, the exculpatory evidence was either not substantial (*Santiago*) or was subject to interpretation (*Vincent*), and the government's reliance upon them to establish a "conflict" is curious.

The balance of the cases relied upon by the government are similarly inapposite. In *United States v. Adamo*, 742 F.2d 927 (6th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985), the evidence the defendant claimed was exculpatory was found to be *not substantial* and was subject to differing interpretations. Likewise, in *United States v. Larrazolo*, 869 F.2d 1354 (9th Cir. 1989), the allegedly exculpatory evidence could be interpreted in inconsistent manners, was not substantial, and the government's failure to present that evidence to the grand jury did not render the proceedings fundamentally unfair. In *United States v. McClintock*, 748 F.2d 1278 (9th Cir. 1984), *cert. denied*, 474 U.S. 822 (1985), the court refused the defendant's request to dismiss the indictment because the prosecutor's actions "did not 'significantly infring[e] upon the ability of the grand jury to exercise its independent judgment.' " *Id.* at 1285. And in *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), the court declined to dismiss an indictment because the defendant's unsupported allegations that insufficient evidence was presented to the grand jury were irrelevant and without merit.

Here, the exculpatory evidence was found to be substantial and it expressly negated the element of criminal intent. The evidence was not speculative and it was not subject to different interpretations. As the Tenth Circuit specifically noted, the evidence could lead to the conclusion that respondent was not guilty of the charges. Petition App. pp. 9a-11a. Unlike the cases cited by the government, here the prosecutor's failure to present substantial exculpatory evidence negating guilt to the grand jury tainted its charging decision.

The government relies upon decisions rendered by the First, Sixth, Eighth, Ninth and Eleventh Circuits but it fails to address the fact that other decisions by those courts are consistent with the outcome in this case and the rule of *Page*. The First (*United States v. Giorgi*, 840 F.2d 1022 (1st Cir. 1988)), Sixth (*United States v. Nathan*, 816 F.2d 230 (6th Cir. 1987)), Eighth (*United States v. Peterson*, 698 F.2d 921 (8th Cir. 1982)), Ninth (*United States v. Samango*, 607 F.2d 877 (9th Cir. 1979)), and Eleventh (*United States v. O'Keefe*, 825 F.2d 314 (11th Cir. 1987)) Circuits all recognize that an indictment may be dismissed if the government's conduct materially affects the integrity of the grand jury process thus unduly influencing the charging decision. Those decisions neither run afoul of *Bank of Nova Scotia* nor do they conflict with the rule announced in *Page* and applied in this case.[5]

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[5] The government devotes a substantial portion of its Petition to practical burdens which it claims will result should *Page* not be overturned. Specifically, the Petition argues that application of the rule announced in *Page* will (i) burden the grand jury with the "need to explore all possible trial defenses"

(Continued on following page)

Although prosecutors are not required to "ferret out and present every bit of potentially exculpatory evidence," *Page*, 808 F.2d at 728, all the Courts of Appeals that have considered the issue have recognized that,

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before deciding whether to indict, (ii) obstruct the grand jury's proceedings by imposition of judicial oversight relating to whether a prosecutor has withheld exculpatory evidence, and (iii) impose significant and unjustified costs in determining "whether prosecutors had withheld exculpatory evidence from the grand jury. . . . " Petition pp. 12-13. All of these concerns relate to theories of defense, rather than the intentional withholding of substantial exculpatory evidence negating an essential element of the crime charged. More importantly, none of these purported concerns consider either the limited circumstances in which the *Page* court recognized that the prosecutor has a duty to disclose, or the facts of this case.

It is noteworthy that the "high cost" the government claims would be paid by a "regime" that would require a prosecutor to disclose substantial exculpatory evidence in his possession "so powerful that it would likely motivate a grand jury not to indict" is already an obligation of federal prosecutors throughout the land. Petition p. 15. The government has acknowledged that the United States Attorneys' Manual provides as follows:

> When a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor *must present or otherwise disclose* such evidence to the grand jury before seeking an indictment against such a person.

Id. (quoting United States Attorneys' Manual, § 9-11.233, at 15 (1988) (emphasis added)). This duty is mandatory. The regime which so concerns the government is thus already a practice adopted by and apparently followed in some sectors by the Department of Justice.

in appropriate circumstances, prosecutors must disclose substantial evidence in their possession negating guilt.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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